

FCC REGULATION OF MVPDS DOES NOT AMOUNT TO A COMPULSORY CONTENT LICENSE, NOR DOES DEVICE COMPETITION IMPLICATE COPYRIGHT

- Pursuant to the Communications Act, the FCC regulates MVPDs. Because MVPDs primarily carry programming created by others, MVPD regulations have effects on programmers. For example, MVPDs generally negotiate with cable channels over channel placement and “neighborhooding.” However, cable companies must carry broadcasters on their normal broadcast channel number. Cable channels cannot ask to be carried on a channel number that is occupied by a broadcaster, and any contractual provisions that attempt to do so are null and void.
- The Communications Act compels the FCC to adopt regulations to ensure that there exists a competitive marketplace for equipment used to access and navigate content distributed by MVPDs. 47 U.S.C. § 549.
- Pursuant to this Congressional mandate, MVPDs are required to make their programming available on competitive devices. For many years, cable companies complied with this rule by supporting CableCARD. As with other MVPD legal requirements, CableCARD support is not optional. Program licenses, contracts, copyright law, or other business deals do not provide a way for programmers to exclude their content from CableCARD devices.
- Neither CableCARD, nor tiering/neighborhooding regulations, nor any other statutes or FCC rules amount to a compulsory content license. The terms of MVPD carriage are still negotiated between programmers and cable companies in the marketplace. FCC rules merely place certain conditions on MVPD carriage, and programmers are not required to distribute programming via MVPDs.
- For the same reason, neither FCC’s original “three information flows” proposal, nor its modified app proposal, nor the NCTA app proposal, amount to a compulsory copyright license. Different proposals may vary in how well they achieve competitive goals, but they all would require MVPDs to make programming available on competitive devices.
- Indeed, nearly every feature of the FCC’s proposals that some programmers claim amounts to a compulsory license has always been part of the CableCARD regime. Specifically, CableCARD devices have always presented their own user interfaces, offered home recording features that go beyond what MVPD-provided devices allow, and so forth. Additionally, with a single CableCARD device, it is possible to stream cable and broadcast programming to any device in the home (TV-connected streaming devices, PCs, mobile phones, etc). It is not credible to claim that CableCARD differs meaningfully from current proposals. Current

proposals are not designed to go beyond CableCARD, but only to update its technology to increase competition and consumer choice.

- Fundamentally, the primary copyright interest implicated by MVPD carriage of programming is the public performance right. MVPDs publicly perform copyrighted works, for which they need a license, and programmers are free to condition those licenses as they see fit. However, these conditions cannot require that MVPDs break the law. Contracting parties cannot decide between themselves to circumvent lawful FCC rules or duly-enacted statutes.
- Requiring MVPDs to make programming available on competitive devices, either under CableCARD, the information flows proposal, or an app approach, places limits on the terms of the public performance license that programmers grant MVPDs, as do many other FCC rules. However, no further copyright license beyond the initial public performance license is required, either by MVPDs, viewers, or competitive device manufacturers.
 - The scope of copyright is clearly delineated in 17 U.S.C. § 106. The makers of end-user devices do not require a license to sell devices that can display programming that is being publicly performed by MVPDs, and displaying content does not amount to a “reproduction” or a “distribution.” Analogously, the makers of television sets, mobile phones, and computers have never been required to obtain a license merely to display copyrighted programming. Even if one views the MVPD’s public performance as terminating with MVPD-controlled equipment (e.g., a cable modem or converter device), any further in-home transmissions of content to competitive devices are merely private performances which are outside the scope of copyright law.
 - When a user views MVPD programming, she is viewing a public performance initiated by the MVPD. As discussed above, the MVPD obtains this license in the open marketplace, which is freely negotiated but subject to FCC rules and statutes enacted by Congress. But no further license is required.
- An agreement between a device manufacturer and MVPD that controls the terms of access to the app also cannot be considered a “compulsory license.” First, the separate, existing carriage agreement between the MVPD and the programmer is the license that grants the MVPDs the necessary rights to provide its service, including app support. Programmers, by contrast, will have input into, and be third-party beneficiaries of, the agreement between MVPDs and device manufacturers, which will concern security and similar matters. But they are not party to it, and this device/MVPD agreement is not a programming license in the same sense as the MVPD/programmer license. Finally, while the FCC must have oversight of the device/MVPD agreement to ensure it does not undermine the Commission’s objectives, the FCC will not draft this agreement.